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No. 71-196

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In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES W. LEE, JR. and RAY METCALF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On February 5, 1970, after a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of causing travel in interstate commerce to facilitate a gambling enterprise, in violation of 18 U.S.C. 1952.[1] Each

[1] Two co-defendants, Sights and West, who were charged with actual travel on specific dates from Henderson County, Kentucky to Evansville, Indiana, where they were employed in petitioners' gambling enterprise, were also convicted.

was sentenced to concurrent five-year prison terms on each count and fined a total of $15,000. The court of appeals affirmed (Pet. App. 3a-7a).

The evidence which is set forth in some detail in the opinion below showed that on August 9, 1969, petitioners operated an illegal gambling enterprise in Evansville, Indiana. The enterprise was located in a two-story building which petitioner Metcalf and his wife had owned for fifteen years. The first floor of the building contained a barber shop, Ray's Tavern, which petitioner Metcalf leased to his brother, Louis, and an all night restaurant, The Pancake House, which was operated by the L & M Co. (Lee and Metcalf) and managed by Robert Kasey who had formerly leased Ray's Tavern and held the tavern liquor license in his name (1 V 8-18).[2] The gambling enterprise was located in a second story room above the restaurant. On the above date, federal agents acting pursuant to a search warrant, gained access to the building through the restaurant and proceeded to the gambling room, where they seized extensive gambling paraphernalia and arrested some thirty-eight individuals.[3]

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[2] 1 V refers to the one volume transcript of the proceedings held on motions to suppress evidence seized in the raid. The testimony at trial is contained in a second volume, 2 V.

[3] Among the items seized in the main room of the gambling establishment were two dice tables, a blackjack table, chips, playing cards, croupier sticks and $14,200.71, mainly in cash. A locked second floor office used by the enterprise was also searched by the agents, and $23,000 in cash was found in a safe. A file cabinet was found to contain documents per-

Prior to the raid agents had conducted extensive surveillance of the gambling room and of two suspected employees of the enterprise, co-defendants Sights and West, both of whom were Kentucky citizens.[4] In late July 1969 an undercover agent (Standifer) entered the building in which Ray's Tavern was located, and, after some discussion with a guard, was admitted to the second floor gambling room (2 V 327). Agent Standifer then introduced a second undercover agent (King), and both men made numerous visits to the room before the raid on August 9, 1969. Both agents testified at length as to their observations of the operation and the various individuals involved. Their testimony confirmed the now-conceded fact that petitioners were the proprietors of the operation. Their observations during this period fully supported the view that Sights, who was regularly observed working in the cashier's cage, and West, who was regularly observed working at the dice tables as a croupier or "stick-man", were employees of the enterprise (2 V 132, 152, 167, 179-180, 192-193, 206-207, 221, 248-249, 256-257, 302-316, 326-344).

The testimony of the agents was further supported by the testimony of patrons and admitted employees of the enterprise called by the government. One wit-

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taining to the L & M Co. None of the evidence seized from the office which Metcalf had unlocked at the agents' request was introduced in evidence (1 V 66-99, 2 V 301A).

[4] The proof showed that West had resided in Kentucky for at least seven or eight years and that Sights had resided there for at least ten years (2 V 362, 364).

ness, a patron, testified that she had been going to the room to gamble for two years and had seen West working behind the dice table (2 V 132-133). Another witness testified that he had been going there since 1962 and had observed both co-defendants there regularly (2 V 210). Two dealers at the black-jack table, Hollingsworth and Simpkins, testified that they received a two-thirds percentage of the profits from the table while petitioners took the remaining one-third. A hostess, apparently carried as an employee of Ray's Tavern but who worked upstairs, and a dice-man employed by L & M Co. testified that they were paid by check on a weekly basis, by one or the other of the petitioners, and that they received W2 tax forms each year (2 V 217, 223, 245, 247). A dice-man who was employed "off and on," mainly on weekends, testified that he was paid in cash and that he received no W2 tax forms (2 V 164, 170).

1. Petitioners' main contention here is that the Kentucky co-defendants, Sights and West, were patrons of the enterprise, who at most may have volunteered help from time to time. The argument is aimed at bringing the petitioners' case within the rule of *Rewis* v. *United States*, 401 U.S. 808, that gambling operators do not violate 18 U.S.C. 1952 by the coincidental fact that some of their patrons cross state lines. However, the record shows that Sights and West were employees of the petitioners and that petitioners were within the settled line of cases "correctly appl[ying] § 1952 to those individuals whose agents or employees cross state lines in fur-

therance of illegal activity * * *." *Rewis* v. *United States*, *supra*, at 813.

In denying motions to dismiss at the end of the government's case, the court, citing the testimony of the federal agents and admitted employees of the enterprise set forth above, concluded: "frankly, I don't think there is a shadow of doubt * * * that they were employees" (2 V 373). Certain arguably conflicting or contradictory testimony on this question, relied on by petitioners (Pet. 10-13), appears to have arisen as a result of efforts by defense counsel on cross-examination to show that the co-defendants were not paid employees. However, the jurors were well aware of the relationship of those witnesses—players and employees—to the various defendants and thus could resolve any conflict.

2. Petitioners' second contention is that the evidence was insufficient to show that they had knowledge of the interstate travel of co-defendants Sights and West and that the trial court improperly refused to charge that such knowledge was an element of the offense. As the opinion below notes, the instructions "clearly required the jury to find that appellants had knowledge of their 'co-defendants' interstate travel" (Pet. App. 6a). Moreover, the court below properly ruled that the jury could reasonably infer such knowledge from the co-defendants' long-time employment in the enterprise, their long-term residence in Kentucky, and the fact that they regularly commuted to work in cars bearing Kentucky license plates. In any event, the instruction that

knowledge of their co-defendants' interstate travel was required unnecessarily favored petitioners. As one court of appeals has held (in our view correctly), such knowledge is not an element of the substantive offenses under 18 U.S.C. 1952. *United States* v. *Roselli*, 432 F. 2d 879, 891 (C.A. 9), certiorari denied, 401 U.S. 924.

3. Petitioners' remaining contentions as to the constitutionality of 18 U.S.C. 1952 and the validity of the search are without merit. The statute has been repeatedly upheld. *United States* v. *Lookretis*, 422 F. 2d 647 (C.A. 7), certiorari denied, 398 U.S. 904; *United States* v. *Barnes*, 383 F. 2d 287 (C.A. 6), certiorari denied, 389 U.S. 1040; *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915. The issue of the validity of the search in this case was thoroughly canvassed by the court below on whose opinion we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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